STATE OF MICHIGAN

COURT OF APPEALS

RICHARD AND MARY LACKS IRREVOCABLE TRUST, RICHARD J. LACKS SR., and MARY J. LACKS,

Plaintiffs-Counterdefendants-Appellants,

UNPUBLISHED
February 18, 2000

v

No. 215742
Kent Circuit Court
LC No. 96-001662-CK

LARRY A. LYDAY and EXECUTIVE FINANCIAL GROUP,

Defendants-Counterplaintiffs, Third-Party Plaintiffs-Appellees,

v

JAMES TEETS,

Third-Party Defendant.

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. We affirm.

I. FACTS AND PROCEEDINGS

This case arises from defendants' sale of a life insurance policy to plaintiffs. Plaintiffs' accountant, Jerry Nichols, acted on plaintiffs' behalf in arranging the transaction. Plaintiffs allege that defendants committed acts of fraud and misrepresentation in the course of this transaction. Specifically, plaintiffs allege that they tried to purchase a "twice to die" policy worth $5.8 million dollars to benefit their grandchildren. Plaintiffs did not want to pay more than $700,000 for this policy. Plaintiffs, Nichols, and a probate attorney decided to set up an irrevocable trust to purchase the life insurance policy with plaintiffs' joint exemption money. Plaintiffs anticipated that the interest from the $700,000 in the trust plus the dividends received from the life insurance policy would pay for any premium payments that may have exceeded the anticipated $700,000 premium. However, the trust's investments and the expected dividends did not generate enough money to pay the seventh $116,000 annual premium.[1] Upon learning this, plaintiffs sued defendants for misrepresentation and fraud. The trial court granted defendants' motion for summary disposition based on MCR 2.116(C)(10) and MCR 2.116(C)(7).

II. ANALYSIS

A

Plaintiffs argue that the trial court erroneously granted defendants' MCR 2.116(C)(10) summary disposition motion on the ground that plaintiffs' accountant, Jerry Nichols, was an agent for plaintiffs. The court reasoned that by providing Nichols, plaintiffs' agent, with all pertinent information on the policy, defendants effectively provided this information to plaintiffs.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* Both this Court and the trial court must resolve all reasonable inferences in the nonmoving party's favor. *Bertrand v Allan Ford*, 449 Mich 606, 618; 537 NW2d 185 (1995).

Regarding an agent's authority to act for and bind his principal, our Supreme Court stated in *Burton v Burton*, 332 Mich 326; 51 NW2d 297 (1952):

> "'An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal.' Bowstead on Agency (4th ed), p 3.
>
> "'An agent is one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter, and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the things which the principal may or can do.' 2 CJS, p 1025. [*Id.*, 337, quoting *Stephenson v Golden*, 279 Mich 710, 734-735; 276 NW 849 (1937).]

As a general rule, "notice or knowledge of an agent received while acting in the course of his employment and within the scope of his authority is binding on the principal even though not communicated to him." 2 CJS, *supra*, § 432; see also *Katz v Kowalsky*, 296 Mich 164, 174; 295 NW 600 (1941).

Plaintiff's deposition testimony clearly demonstrates that Nichols was acting "with express or implied authority to represent or act on behalf of" plaintiffs. Plaintiff Richard Lacks testified that Nichols "was always involved" in the discussions regarding the insurance policy, that he depended on Nichols for recommendations, that Nichols was to handle the "mechanics" of setting up the policy, that he left the details up to Nichols, and that he [plaintiff Richard Lacks] never reviewed the policy. Accordingly, if defendants gave notice to Nichols that the policy did not satisfy plaintiffs' criteria, that notice is binding on plaintiffs. Plaintiffs therefore cannot prevail on their claims unless they can establish that defendants made misrepresentations to Nichols.

B

Plaintiffs maintain that they raised evidence to support three allegations of misrepresentations by defendants: (1) that defendants represented to plaintiffs that the $5.8 million life insurance policy could be purchased for $700,000; (2) that there would be only a nine-year "pay off" period on the life insurance policy; and (3) that defendants failed to disclose that the dividend payments from the life insurance policy could decrease and cause the actual cost of the life insurance policy to exceed the $700,000 plaintiffs invested to pay for the policy.

As a general rule, fraud consists of the following elements: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), quoting *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

To establish a claim for innocent misrepresentation, the plaintiff must establish that he "detrimentally relie[d] upon a false representation in such a manner that the injury suffered by that party inure[d] to the benefit of the party who made the representation." *M&D, Inc, supra*, 231 Mich App 27, quoting *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). Additionally, the plaintiff must show that the plaintiff and the defendant were in privity of contract. *Id.*, 28. Thus, innocent misrepresentation "represents a species of fraudulent misrepresentation", but omits the element of intentional fraud or fraudulent purpose, while adding the elements of unintentional misrepresentation and a benefit to the person making the misrepresentation. *Id.*, 27-28. Here, plaintiffs have failed to establish the elements for either tort.

With regard to the first alleged misrepresentation, the record reflects that defendants never represented to plaintiffs that defendants were going to provide a $5.8 million life insurance policy for a single premium payment of $700,000. Although plaintiff testified that his understanding was that he was to receive a $5.8 million life insurance policy for $700,000, the information defendants gave Nichols clearly showed that the premiums on the policy would be at least $116,000 per year for nine years, in essence, a total investment of $1,044,000. Furthermore, this information showed the expected dividend amounts and the amount of insurance available from the proposed life insurance program. This information was sufficient to put plaintiffs on notice that they might have to pay more than $700,000. Therefore, the record does not reflect that defendants ever promised a $5.8 million dollar policy for $700,000.

With regard to the second alleged misrepresentation, the record reflects that defendant did not represent to plaintiffs that there would be only a nine-year "pay off" on the life insurance policy. Instead, the information defendants gave Nichols clearly stated that a change in the dividend scale might increase the number of cash premium payments. Thus, because defendants informed Nichols that the premiums could or would continue after nine years, defendants did not misrepresent the number of premium payments.

With regard to the third alleged misrepresentation, the record reveals that defendants disclosed that the dividend payments from the life insurance policy could decrease and cause the cost of the life insurance policy to exceed $700,000. The record also reveals that Nichols was aware that the dividend payments could decrease and thus cause the cost of the insurance policy to exceed $700,000. Nichols testified that he received the materials regarding the dividends from defendant. These materials showed the expected dividend amounts, premium payments, and amount of insurance available from the proposed life insurance program. With regard to the expected dividend amounts, the information in the materials specifically stated that the dividend scale might increase the number and amount of cash premium payments. Accordingly, the record does not support plaintiffs' allegations.

Additionally, there is no actionable fraud because the allegations relate to a future promise or expectation. *Webb v First of Michigan Corporation*, 195 Mich App 470, 473-474; 491 NW2d 851 (1992). Furthermore, "there can be no fraud where the means of knowledge regarding the truthfulness of the representation are available to the plaintiff and the degree of their utilization has not been prohibited by the defendant. *Id*., 474 (quoting *Schuler v American Motors Sales Corp*, 39 Mich App 276, 279-280; 197 NW2d 493 (1972). Here, defendants not only communicated with plaintiffs' agent about future occurrences (i.e., the future performance of the life insurance policy dividends), but also transmitted information about the policy's expected dividend amounts, premium payments, and amount of insurance available with the program. Thus, there is no actionable fraud because the allegations relate to a future promise or expectation and because the information regarding the possibility of decreased dividends were given to plaintiffs' agent for his review.

Because the trial court properly granted defendants' motion for summary disposition, we need not address the statute of limitations issue.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck

[1] Furthermore, the policy was, in actuality, worth only $3,512,114.